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The Impact of U.S. Tort Law in Canada

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I. INTRODUCTION

On April 16, 2010, a symposium was held at Pepperdine University School of Law in Malibu, California, on the topic *Does the World Still Need United States Tort Law?* Tort scholars from the United States, Canada, England, and Australia came together to consider the influence that American tort law has had, and continues to have, on the tort law of other jurisdictions. The symposium was organized to honor the career of retired Canadian Federal Court of Appeal Justice and tort scholar Allen M. Linden. Justice Linden has been teaching torts at Pepperdine for a number of years.

As I listened to the various presenters during the one-day symposium, what impressed me was how little influence U.S. tort law has had on other jurisdictions, particularly Commonwealth countries such as England, Australia, and New Zealand. The presenters offered a number of reasons for this, discussed more fully in their papers published in this Review. Little, however, was said about the impact that U.S. tort law has had on its

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Commonwealth country neighbor—Canada.[1]

In this paper, I will briefly summarize some of the reasons offered by Professor Peter Cane for the minimal impact that U.S. tort law has had on the tort law of Australia and New Zealand.[2] I will then discuss this matter from the perspective of Canadian tort law.[3] I will suggest that, for a variety of reasons, Canada is in a unique position; it shares some of the same characteristics of the Commonwealth countries which discourage the adoption of U.S. tort law, but at the same time is exposed to countervailing factors which tend to bring Canadian and U.S. tort laws closer together.[4] I will illustrate this point by identifying a few characteristics of Canadian tort law which are very American.[5]

II. THE IMPACT OF U.S. TORT LAW ON COMMONWEALTH COUNTRIES

Professor Peter Cane's presentation focused on the influence of U.S. tort law in Australia and New Zealand.[6] His conclusion was that U.S. tort law has had, and likely will continue to have, little impact in these jurisdictions.[7] In general terms, the reasons for this can be categorized as historical, political, ideological, and social.

Australia and New Zealand have a much greater historical tie to English common law than does the United States. This is epitomized by the fact that for many years the U.K. Privy Council was the final Court of Appeal for these Commonwealth countries.[8] English tort law and, in particular, decisions of the English House of Lords were highly influential. There was extensive reliance on English tort law texts in the development of the tort law in these jurisdictions.[9] This naturally displaced the potential influence of U.S. tort law, both in terms of its judicial decisions and scholarly commentary.

Canadian tort law followed this pattern. Appeals to the Privy Council from judgments of the Supreme Court of Canada, for example, were only formally abolished in 1949.[10] Texts by English authors such as Sir John

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1. See Linden's earlier paper, Allen M. Linden, *The American Influence On Canadian Tort Law*, 50 UCLA L. REV. 407 (2002), written in tribute to the late Gary Schwartz, where Justice Linden provides a number of important insights on this topic.

2. *See infra* Part II.

3. *See infra* Part III.

4. *See infra* Part IV.

5. *See infra* Parts V–X.

6. See Professor Cane's paper, Peter Cane, *Searching for United States Tort Law in the Antipodes*, 38 PEPP. L. REV. 257 (2011), for a full discussion. I was assisted in preparing this paper by having had the opportunity to read his draft.

7. *See id.* at 282.

8. *See* BRUCE KERCHER, AN UNRULY CHILD: A HISTORY OF LAW IN AUSTRALIA 46 (1995).

9. *See id.* at 166.

10. Act to Amend the Supreme Court Act, 1949, ch. 37, S.C. § 3 (2d Session) (Can.).

William Salmond, Harry Street, and John Frederic Clerk and William Henry Barber Lindsell, as well as articles in highly respected journals such as the Law Quarterly Review, figured prominently in Canadian tort law judgments.[11]

The political systems in jurisdictions which have a British parliamentary form of government was another reason given by Professor Cane for the lack of influence of U.S. tort law judgments in those jurisdictions.[12] Governing parties who have parliamentary majorities can implement legislative tort law reform much more easily than American legislators. Thus, there need be less reliance on the common law of torts to accomplish significant change. Judges can follow doctrinal principles rather than attempting to be policy makers in developing the common law of torts, leaving it to the legislators to fix any practical problems which this might cause. Academics similarly are inclined to be more formalistic and doctrinal in their writing, research, and teaching about tort. The Canadian political system follows the British parliamentary model, and one might therefore assume that Canadian tort law would follow a similar pattern.

American tort law judges, on the other hand, are arguably more inclined to be concerned with the practical policy effects of their tort law judgments because they are cognizant of the fact that American legislative tort law reform is a difficult and slow process. According to Professor Cane, tort law in the United States is seen as a "tool of regulation."[13] The "instrumentalist" or "legislative" function of tort law dominates U.S. tort law.[14]

Differences in ideology and values may also explain why U.S. tort law has not been embraced in other countries. Professor Cane, for example, noted that Australians are "less suspicious of government and government provision than Americans," and hence governments are given greater scope for bold action.[15] Australia is also described as a "less individualistic society than the United States."[16] Foreign countries are wary of creating a U.S. "blame (or 'compensation') culture" by adopting U.S. tort law.[17] It is

11. *See, e.g.*, Hobbs Mfg. Co. v. Shields, [1962] S.C.R. 716 (Can.) (adopting Law Quarterly Review editor Dr. A.L. Goodhart's interpretation of Donoghue v. Stevenson, [1932] A.C. 562, to determine whether machine manufacturer was liable when electrician installing machine was electrocuted); Canadian Nat'l Rys. v. Canadian Indus., [1941] S.C.R. 591 (Can.); Grand Truck Pac. Ry. v. Earl, [1923] S.C.R. 397 (Can.); Nat'l Trust Co. Ltd. v. Fleury, [1965] S.C.R. 817 (Can.); *see also* Linden, *supra* note 1, at 410.

12. *See* Cane, *supra* note 6, at 271.

13. *Id.* at 272.

14. *Id.* at 271–72.

15. *Id.* at 270–71.

16. *Id.* at 271.

17. *Id.* at 266.

my impression that Canadians also view themselves as different from Americans when it comes to their values and ideological preferences, although whether they actually are is a matter of academic debate.[18]

Finally, it was argued that in these other jurisdictions there are more extensive social safety nets than exist in the United States, such as universal health insurance.[19] Thus, there is less reliance on tort law to compensate personal injury accident victims. Canada also fits this model with, for example, its comprehensive universal health insurance.

III. A BRIEF EXPLANATION OF CANADIAN TORT LAW

Before discussing the impact of U.S. tort law in Canada, a brief explanation of what I mean by Canadian tort law might be helpful. Canada is a confederation comprised of ten provinces, three territories, and a central federal government. Tort law is, for the most part,[20] a matter of provincial jurisdiction and for nine of the ten provinces combines both common law and provincial statutes. Quebec is a Civil Law province, and its law of delict is found in its Civil Code.[21] When I speak of Canadian tort law, therefore, I am referring to the common law of torts and not the Quebec civil law of delict.[22]

In one sense, it is not possible to speak of "Canadian" tort law because tort law varies from province to province. However, there is one unifying force which ties much of the tort laws of the different provinces together: the Supreme Court of Canada. The Supreme Court of Canada is the final court of appeal from the appeal courts of all ten provinces and territories.[23] Thus,

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18. See especially Seymour Lipset's research and subsequent commentaries and critiques of his thesis. *E.g.*, SEYMOUR MARTIN LIPSET, CONTINENTAL DIVIDE: THE VALUES AND INSTITUTIONS OF THE UNITED STATES AND CANADA (1990); Seymour Martin Lipset, *The Values of Canadians and Americans: A Reply*, 69 SOC. FORCES 267 (1991); *see also* Doug Baer, Edward Grabb & William A. Johnston, *The Values of Canadians and Americans: A Critical Reassessment*, 68 SOC. FORCES 693 (1990).

19. *See* Cane, *supra* note 6, at 270–71.

20. I say "for the most part" because with respect to some matters, e.g., maritime law, Canadian tort law is under federal jurisdiction. *See* Marine Liability Act, S.C. 2001, c. 6 (Can.). In addition, other matters under federal jurisdiction, such as criminal law, have statutes which impact greatly on tort law issues. *See, e.g.*, Criminal Code, R.S.C. 1985, c. C-46, s. 219 (Can.) (criminal negligence). The Criminal Code defenses with respect to arrest and imprisonment, for example, are defenses in tort actions.

21. *See* Civil Code of Québec, L.R.Q., c. C-1991, art. 1457 (Can.) ("Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another. Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature. He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody.").

22. It would be interesting to consider the impact of U.S. tort law on Quebec's civil law, but this is not something which I addressed in this paper.

23. *See About the Court: The Canadian Judicial System*, SUP. CT. OF CAN., http://www.scc-csc

when the Supreme Court of Canada decides an issue relating to the common law of torts, it is binding on the common law of all of the provinces and territories.[24] Unless that decision has been altered by provincial legislative enactment, the law of torts is the same everywhere.

Tort law can vary from province to province in two circumstances. First, the matter might be one which has not been decided by the Supreme Court of Canada. In this case, the Court of Appeal of the individual province would determine the issue for that province, and it would not be bound by decisions of other provincial courts of appeal. Second, the province might have passed legislation with respect to that issue. There are a large number of such tort statutes: for example, legislation dealing with defamation, contributory negligence, contribution between tortfeasors, occupiers' liability, joint and several liability, caps on certain types of damage awards, municipal government liabilities, and so forth.

In addition to tort law, there are other legislative schemes in Canadian provinces which provide compensation to accident victims.[25] These range from pure automobile no-fault to partial no-fault, choice no-fault, workers compensation, and criminal injuries compensation. Some of these schemes completely oust torts, such as pure automobile no-fault, while others provide alternative sources of compensation.[26]

Having said all of that, I do not feel uncomfortable talking about the "Canadian" law of torts because the substance of Canadian tort law is common law and, on all important principles, is uniform in the common law jurisdictions.

IV. THE IMPACT OF U.S. TORT LAW IN CANADA

While Canada has many of the same characteristics as other Commonwealth countries noted by Professor Cane,[27] which tend to minimize the influence of U.S. tort law in Canada, there are strong uniquely Canadian countervailing factors.

Foremost among these is, of course, geographical proximity. This has allowed extensive interaction between Canadian and American academics, lawyers, and judges, which encourages the understanding and adoption of

.gc.ca/court-cour/sys/index-eng.asp (last modified Jan. 7, 2009).

24. *See id.*

25. *See* ALLEN M. LINDEN & LEWIS N. KLAR, CANADIAN TORT LAW: CASES, NOTES & MATERIALS 727 (11th ed. 1999).

26. *See id.*

27. *See* Cane, *supra* note 6.

each other's laws and attitudes.[28]

Take, for example, the post-graduate legal education of professors who currently teach in Canadian law schools. It is arguable that exposure to American law during their academic studies will influence Canadian academics in their own teaching and research.[29]

We examined the credentials of full-time professors teaching in fifteen Canadian common law schools.[30] Of the approximate 550 graduate law degrees obtained by these professors,[31] roughly 38% were from Canadian law schools, 38% from U.S. schools, 18% from the United Kingdom, and the remaining few from elsewhere. Thus, almost 40% of the graduate studies which current Canadian law professors undertook were done in the United States. This number includes several of Canada's tort law authors[32] who studied in the United States, but it does not include the presumably large number of Canadian law professors who choose to go to an American school for their sabbatical leaves. Extensive scholarly interactions with the United States also would be true for visiting speakers and seminar programs. This would apply not only to law professors and students who participate in these programs, but to lawyers and judges who benefit from presentations by American speakers in continuing legal and judicial education programs.[33]

When this level of interaction is compared with the interaction that occurs elsewhere, we see dramatic differences. We examined the credentials of full-time professors teaching in eight Australian law schools.[34] Of the 438 graduate degrees obtained by these professors, only roughly 14% were obtained in American schools. About 45% of Australian law professors remained in Australia for their postgraduate studies, with 23% going to the United Kingdom. New Zealand law professors followed a similar pattern. We examined four law schools.[35] Of 121 postgraduate law degrees, 30%

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28. *See* Linden, *supra* note 1, at 410.

29. *See id.*

30. University of British Columbia, University of Victoria, University of Calgary, University of Alberta, University of Saskatchewan, University of Manitoba, Western, Windsor, University of Toronto, Queens, Osgoode Hall, University of New Brunswick, Dalhousie, Ottawa, and McGill. We looked at the information posted on these school's current web sites.

31. Some professors had multiple degrees. All degrees were counted equally, e.g., Masters, Doctorates, and Ph.Ds. It is difficult to know whether all professors and all degrees were noted, and thus all numbers appearing here must be considered approximate.

32. For example, Linden, Feldthusen, Craig Brown, and Ernie Weinrib. Linden points out that some of the earlier leading Canadian tort law scholars such as Dean C. A. Wright and Professor Malcolm MacIntyre also studied in the United States, bringing back to Canada and into their scholarship ideas from American tort law. *See* Linden, *supra* note 1, at 411–12.

33. Linden makes this point with particular reference to meetings of the American Association of Law Schools, conferences of the American Trial Lawyers Association, and the New York University Seminars for Appellate Judges. *See id.* at 413. Linden also notes lectures given in Canada by leading U.S. tort law academics. *See id.* at 413–14.

34. A.N.U., Bond, Melbourne, N.S.W., Sydney, Victoria, Queensland, and Monash. These figures were obtained from current Faculty web sites.

35. Auckland, Wellington, Canterbury, and Otago.

were obtained in New Zealand, 27% in the United Kingdom, and 24% in the United States. In terms of law professors at seven U.K. law schools,[36] about 66% of them studied at U.K. schools, while only 11% went to the United States.

In addition to interaction amongst faculty members, there is interaction between Canadian and American law schools in terms of their student programs. At least three Canadian law schools have joint U.S./Canadian law degree programs.[37] Some graduates of Canadian law schools go directly to the United States to practice. There has been what I would call the "Americanization" of Canadian legal education. This is symbolized by the fact that virtually all Canadian common law schools have adopted the "J.D." law degree instead of the more traditional LL.B. for their undergraduate law students.[38]

In addition to geographical proximity which makes interaction between Canadians and Americans much more extensive than is possible with those Commonwealths overseas, there are other important cultural and media influences. Canadians and Americans watch the same television shows and movies, travel extensively back and forth, use the same products, and trade extensively with each other.

Canadian and American plaintiffs sue Canadian and American companies for injuries caused by products manufactured in either country. Motor vehicle accidents involving residents of both countries bring into play the laws of both countries. All of these interactions influence a whole host of laws, tending to bring them more in line with each other.

A. The Civil Jury

A point frequently mentioned at the Symposium was that the use of the civil jury in the United States and its rare use in other jurisdictions has impacted the role that U.S. tort law has played globally. Professor Green, for example, noted that in jurisdictions which do not use jury trials, the issue of the existence of a duty of care in the negligence action is less important.[39]

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36. L.S.E., Cambridge, Oxford, University of London, King's College London, University College London, and University of London School of Oriental and African Studies.

37. University of Alberta with University of Colorado, University of Windsor with University of Detroit Mercy School of Law, and University of Ottawa with Michigan State and Washington College of Law.

38. *See* Vesna Jaksic, *Canadian Law Schools Begin Switching to J.D.s*, NAT'L L.J., Mar. 31, 2008, at 6, *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1206441804760&slreturn=1&hbxlogin=1#.

39. *See* Michael D. Green, *The Impact of the Civil Jury on American Tort Law*, 38 PEPP. L. REV. 337 (2011). This is not true for Canada. The existence of a duty has become a major issue in

The use of a civil jury influences the way lawyers prepare and plead their cases, the size and type of damages which are awarded, and, more importantly, the way the law develops. Because judges give reasons for their decisions and juries do not, judges who act as both judge and jury influence the development of tort law principles to a much greater degree. It was assumed by conference presenters that the civil jury is not used outside of the United States in Commonwealth jurisdictions.

Although this is true of Australia and England, it is not true of Canada. Aside from defamation actions, civil juries are rarely used in Australia.[40] While the legal situation varies between the different states,[41] section 85 of the New South Wales Supreme Court Act 1970 provides, for example, that "[p]roceedings in any Division are to be tried without a jury, unless the Court orders otherwise."[42] It is only where the "court is satisfied that the interests of justice require a trial by jury in the proceedings" that a court may order one.[43] This provision was interpreted and applied by the New South Wales Court of Appeal in *Maroubra Rugby League Football Club Inc. v Malo*.[44] The Court of Appeal made it clear that any departure from the general norm of trial by judge alone can be made only when the interests of justice *require* it.[45] The standard was described as "high and absolute."[46] It was not met in that case.[47] Civil juries were virtually abolished in England

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Canadian negligence law as a result of *Cooper v. Hobart*, [2001] 3 S.C.R. 537 (Can.), which is discussed below. *See infra* notes 79–83 and accompanying text. In addition, even where civil juries are not used, Canadian trial judges must distinguish between duty issues and breach issues in negligence cases since this affects the appeal process. Issues of law, e.g., whether a duty exists, can be reversed by a court of appeal if, in the court of appeal's opinion, it was decided by the trial judge incorrectly. Issues of fact, e.g., whether the duty was breached, can be reversed by a court of appeal only if the finding was "perverse." Trial judges who want to make their judgments "appeal proof" try to characterize everything as a finding of fact. Courts of appeal who want to interfere try to characterize the disputed point as a finding of law. The Supreme Court of Canada is the referee and has, in general, sided with trial judges, limiting the role of courts of appeal.

40. FRANCIS TRINDADE, PETER CANE & MARK LUNNEY, THE LAW OF TORTS IN AUSTRALIA 451 (4th ed. 2007) (stating that "juries are uncommon in negligence actions in Australia"). Also, Neil Foster informs me that in New South Wales there is a very strong presumption against juries in most civil trials unless there is some really compelling reason.

41. For the situation in Victoria, Australia's second largest state, see the outline of the law on jury trials in civil cases in *Gunns Ltd. v Marr (No. 5)* [2009] VSC 284 ¶ 9 (Unreported, Sup. Crt. Vic, 20 July 2009) (Austl.), *available at* http://www.austlii.edu.au/au/cases/vic/VICSC/2009/284.html. Justice Forrest commented that "[t]his State has a long and proud tradition of claims in tort (particularly in injury and defamation cases) being tried by juries." *Id.* ¶ 18. Nevertheless, in the particular litigation, a jury trial was refused given "the multiplicity of claims, defendants and the different forms of damage sought." *Id.* ¶ 20. Again, I thank Neil Foster for this information.

42. *Supreme Court Act 1970* (NSW) s 85 (Austl.).

43. *Id.*

44. [2007] 69 NSWLR 496 (Austl.).

45. *See id.* ¶ 32.

46. *Id.*

47. *Id.* ¶ 32; *see also* Simon v Hunter & New Eng. Area Health Serv. [2009] NSWSC 758 (Austl.).

in 1964; this was done judicially by Lord Denning in *Ward v. James*.[48] Although juries could still be used in "exceptional circumstances," Professors Brown and Yahya point out that this has only been found in one 1965 case and no other since then.[49]

Compare England's practice with the use of civil juries in Canada. Canada's practices vary among provinces, but let us look at the two largest common law provinces: Ontario and British Columbia. In Ontario, the Court of Justice Act, R.S.O. 1990, c. C.43, s. 108 (1) (Can.), provides that, "In an action in the Superior Court of Justice that is not in Small Claims Court, a party may require that the issues of fact be tried or the damages assessed, or both, by a jury, unless otherwise provided." According to the *Civil Justice Reform Project* authored by the Honorable Coulter Osborne Q.C., there were 6,839 civil trials heard between 2005 and 2006,[50] and of these, 1,598 or 24% were set down as jury trials.[51] Seventy-four percent of these involved motor vehicle litigation.[52] The Report indicated that counsel for both plaintiffs and defendants in Ontario wanted this access to civil jury trials to be preserved.[53]

British Columbia's use of the civil jury is also not insignificant. Information which we obtained from British Columbia Court Services shows that in 2009 there were forty civil jury trials heard out of a total of 578 civil trials in the Supreme Court of British Columbia.

Thus, although one could not say that juries in civil trials are common in Canadian provinces, they certainly are not rare. It is likely that with increasing judicial and counsel comfort and experience with juries, their use will increase.

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48. *See* Ward v. James, [1966] 1 Q.B. 273 (Eng.).

49. Russell Brown & Moin Yahya, *Respective Civil Juries*, 30 ADVOC'S. Q. 110–11 & n.3 (2005) (referencing Hodges v. Harland & Wolff Ltd., [1965] 1 All E.R. 1086 (C.A.)). Brown and Yahya support the continued use of civil trials in Canada, arguing that "they are a democratizing influence, allowing laypersons to inject the broad range of legitimate societal values and attitudes into questions of civil obligation and damages and the content of juridical private law rights generally." *Id.* at 115. The authors note that they are available with varying conditions in all provinces except Quebec. *Id.* at 115 n.28.

50. COULTER A. OSBORNE, CIVIL JUSTICE REFORM PROJECT 53 (2007). As the report points out, this figure represents "a day when a trial is being heard." *Id.* Many will settle before or during trial.

51. *Id.*

52. *Id.*

53. *Id.*

B. *Contingency Fees*

A second feature which was noted by conference participants as being an important and distinctive aspect of American tort law is the use of the contingency fee arrangement to pay for a lawyer's services. Here again there are differences between Canada and other Commonwealth jurisdictions.

Contingency fee arrangements, whereby a lawyer's fees are based on a percentage of the award or settlement, are prohibited in Australia and England.[54] Section 325 of the Legal Profession Act 2004 of New South Wales, for example, states that a law practice cannot enter into an agreement under which the amount payable is calculated by reference to the amount of the award or settlement.[55]

In contrast, contingency fee arrangements are not only permitted but are widely used in personal injury actions in Canada. Information which I have obtained from leading civil litigation lawyers in Edmonton is that contingency fees are used in virtually *all* motor vehicle accident and medical malpractice litigation, as well as in other personal injury actions.

Along with contingency fees, another visible indication that Canadian tort lawyers are adopting some American practices is the increase in high-profile advertising. Whereas in earlier days, advertising by Canadian tort lawyers was controlled and modest, it is now common to see large billboards and advertisements on television by motor vehicle accident lawyers.

C. *Punitive Damages*

A notorious feature of the U.S. tort system which is frequently used to highlight the differences between American and Commonwealth tort law is the use of punitive damages.[56] A widely held view is that while multi-

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54. *E.g.*, *Legal Profession Act 2004* (NSW) s 325 (Austl.).

55. *Id.* There are other arrangements which can be entered into, such as "conditional costs agreements," whereby fees or a portion thereof are not paid unless a client's case is successful. *See, e.g.*, *id.* s 323. For recommendations regarding the introduction of contingency fees to England and Wales, see generally Richard Moorhead & Peter Hurst, *Improving Access to Justice*, CIV. JUST. COUNCIL REP. (Nov. 2008), *available at* http://www.civiljusticecouncil.gov.uk/files/cjc-contingency-fees-report-11-11-08.pdf.

56. Following the infamous "hot coffee" jury award of $2.9 million in *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, No. CV-93-02419, 1995 WL 360309 (D.N.M. Aug. 18, 1994), I participated in a symposium on punitive damages published in 1995 by the *Loyola of Los Angeles International and Comparative Law Journal*. *Symposium on Punitive Damages*, 17 LOY. L.A. INT'L & COMP. L.J. 765 (1995); Lewis N. Klar, *Punitive Damages in Canada:* Smith v. MegaFood, 17 LOY. L.A. INT'L & COMP. L.J. 809 (1995) [hereinafter Klar, *Punitive Damages*]. The symposium looked at punitive damages in Canada, Australia, and the United States. The view from Australia and Canada was that a verdict of $3.5 million in a hypothetical hot coffee case would never be sustained in either jurisdiction. It should be noted that in *Liebeck* itself, the $2.9 million jury award was reduced by the court to $480,000. Liebeck v. McDonald's Restaurants, P.T.S., Inc., No. CV-93-02419, 1994 WL 16777705 (D.N.M. Nov. 3, 1994).

million dollar punitive damage awards are awarded in the United States, they would not be tolerated elsewhere.[57] The absence of generous punitive damage awards in Commonwealth countries arguably does have an effect on what types of tort law disputes make their way to litigation in those countries.

In 1995, Professor Feldthusen expressed the Canadian view that:

> [p]unishing wanton, reckless, or outrageous conduct through the civil system is accepted in rare cases only, and then only in judicious amounts. We are not yet ready to delegate to judges, much less to juries, the task of regulating and punishing industry with million dollar punitive damage awards, especially in the absence of legislative direction. *Nevertheless, the pull of U.S. culture, legal and otherwise, is powerful.*[58]

My view at the time was that while I was opposed to the awarding of any punitive damages in tort cases, Canadian tort law supported the awarding of modest punitive damages, primarily in cases involving intentional and deliberate wrongdoing.[59]

While Canadian law is not yet in the multi-million dollar league, the 2002 case of *Whiten v. Pilot Insurance Co.*[60] has moved the goal posts in terms of the size and nature of punitive damage awards. In this case, a civil jury awarded the insureds $1 million against an insurer for its resistance in paying a fire insurance claim.[61] Although the Ontario Court of Appeal reduced the award to $100,000,[62] the $1 million award was restored by the

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57. The American situation regarding punitive damage awards is more complex than is commonly imagined. In *Whiten v. Pilot Insurance Co.*, Justice Binnie notes that "numerous pieces of state and federal legislation now add a variety of controls, ranging from elimination of punitive damages, elimination of punitive damages in certain causes of action, caps, ratios, and diversion of portions of the money (or 'kickers') to public funds so the total amount of compensation does not go to the plaintiff." Whiten v. Pilot Ins. Co., [2002] 1 S.C.R. 595, para. 61 (Can.). Justice Binnie also notes that these are in addition to "constitutional limitations." *Id.* Victor Schwartz's symposium presentation also points out a number of limits, both judicial and statutory, on punitive damage awards. *See* Victor E. Schwartz & Christopher E. Appel, *Exporting United States Tort Law: The Importance of Authenticity, Necessity, and Learning from Our Mistakes*, 38 PEPP. L. REV. 551 (2011). Thus, the assumption that excessive punitive damage awards are common in U.S. tort law cases seems to be misplaced.

58. Bruce Feldthusen, *Punitive Damages in Canada: Can the Coffee Ever Be Too Hot?*, 17 LOY. L.A. INT'L & COMP. L.J., 793, 806–07 (1995) (emphasis added).

59. Klar, *Punitive Damages*, *supra* note 56, at 809.

60. 1 S.C.R. 595 (Can.). The action was against a property insurer for its "bad faith" in responding to a fire damage claim. *Id.* para. 1.

61. *Id.*

62. Whiten v. Pilot Ins. Co. (1999), 170 D.L.R. 4th 280 (Can. Ont. C.A.). It is interesting to note

Supreme Court of Canada.[63] An interesting aspect of the Supreme Court of Canada's majority judgment was Justice Binnie's reference to the warnings of punitive damage critics against "an 'Americanization'" of Canadian law that, if adopted, would bring the administration of justice in Canada into disrepute.[64] Justice Binnie, while acknowledging that these were "serious concerns," affirmed that "jury awards of punitive damages in civil actions have a long and important history in Anglo-Canadian jurisprudence."[65] The Court stated that the objectives of the award were "retribution, deterrence and denunciation."[66] While conceding that awards will ordinarily be restricted to intentional wrongdoing, they are not so limited and are available in any type of case where the defendant's conduct merits condemnation.[67] Punitive damages are, for example, not barred merely because the defendant has already been criminally punished.[68] Whether the $1 million *Whiten* decision will lead to the "Americanization" of Canadian punitive damage awards remains to be seen. It is likely, however, that the combination of increased civil jury use and the *Whiten* judgment will move Canadian tort law into higher punitive damage awards.

D. Class Actions

Victor Schwartz warned that foreign jurisdictions should be careful when they consider "importing" U.S. tort law to ensure that what they import is "authentic," "needed," and "fits what may be a very different legal, political, and social culture."[69] Class actions, punitive damages, and contingency fees were noted in particular.

Canadian tort law makes extensive use of class actions. A very large number of the important Canadian tort law judgments decided in the past few years, especially in relation to the liability of governments, involved class actions. This includes the leading duty of care case, *Cooper v. Hobart*,[70] as well as litigation involving the control and prevention of

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that Judge Finlayson's judgment for the majority took guidance from the U.S. Supreme Court's punitive damage judgment in *Pacific Life Insurance Co. v. Haslip*, 499 U.S. 1 (1990). *Id.* para. 67.

63. Whiten v. Pilot Ins. Co., [2002] 1 S.C.R. 595, para. 128 (Can.).

64. *Id.* para. 39. Justice Binnie referred to the "hot coffee" case, as well as *B.M.W. of North America v. Gore*, 517 U.S. 559 (1996), where a $4 million punitive damage award was granted, but which, as Justice Binnie noted, was ultimately reduced to $50,000 after a "roller coaster ride in the courts." *Whiten*, 1 S.C.R. para. 63.

65. *Id.* para. 40.

66. *Id.* para. 123.

67. For example, they were awarded against a drunk driver in *McIntyre v. Grigg* (2006), 274 D.L.R. 4th 28, para. 115 (Can. Ont. C.A.). The award was made by a civil jury and allowed by the Ontario Court of Appeal, although the amount was reduced. *Id.* para. 115.

68. This is unlike the situation in Australia. *See Gray v Motor Accident Commission* (1998) 196 CLR 1 (Austl.).

69. *See* Schwartz & Appel, *supra* note 57, at 552.

70. [2001] 3 S.C.R. 537 (Can.); *see also infra* notes 79–83.

contagious diseases, such as West Nile Virus and Severe Acute Respiratory Syndrome; the regulation of products and services, such as medical implants, pharmaceuticals, building materials, and chiropractic services; the control and prevention of agricultural and animal viruses, such as Mad Cow and Wasting Elk disease; and funding for the education of children with special needs. The list goes on.[71] The availability and increased use of tort class action proceedings in Canadian provinces has been an important factor in encouraging tort litigation in Canada. This might turn out to be more important than any other single factor, the thing that "Americanizes" Canadian tort law the most.

E. Tort Law as a Vehicle for Social Policy

As noted above, Professor Cane opined that Australian tort law scholars tend to be formalistic or doctrinal in contrast to the more instrumentalist or legislative U.S. tort law scholarship.[72] This is of course reflective of the tort law which these scholars are interpreting and attempting to explain. It is my observation that while Canadian tort law could once have been described as highly doctrinal, that situation has changed. I ascribe this to two factors.

The first is the effect that the Canadian Charter of Rights and Freedoms[73] has had on Canadian law and, more particularly, on judicial decision making. Although much of Canadian tort law is not directly subject to the Charter, because the Charter only applies where there is a governmental connection or a legislative enactment,[74] the Supreme Court of Canada has made it clear that "the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution."[75] This is most evident in torts such as defamation where there is a direct link between the Charter's guarantee of everyone's "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication" and one of the core values of the common law tort of defamation (the other one being the right to protect one's reputation).[76] This Charter value has now finally translated itself into the broadening of the common law defenses available to the

71. See LEWIS N. KLAR, TORT LAW 298 & nn.40–49 (4th ed. 2008) for a reference to many of such cases.

72. *See* Cane, *supra* note 6, at 271–72.

73. Part 1 of the Constitution Act, 1982, *being* Schedule B of the Canada Act, 1982, c. 11 (U.K.).

74. *See* R.W.D.S.U. v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573 (Can.).

75. *Id.* para. 39.

76. Grant v. Torstar Corp., [2009] S.C.C. 61, para. 43 (Can.).

press.[77]

Perhaps more subtle, however, is the effect that the Charter has had on Canadian judicial decision making in general. Canadian judges are comfortable with considering the policy choices inherent in a legal dispute and openly considering them when writing their decisions.[78] Thus, rather than judgments being formalist or doctrinal, they are policy-oriented, even if the Charter is not directly at issue.

The second factor which introduces policy into tort law decisions is the duty of care formula adopted by the Supreme Court of Canada in its 2001 decision in *Cooper v Hobart*.[79] Refining the two-stage duty test of *Anns v. Merton London Borough Council*,[80] the Canadian Supreme Court injected considerations of policy into both stages of the test.[81] A duty of care in novel disputes will not be recognized in Canada unless, considering the relationship between the parties, it would be "just and fair" to do so *and* if there are no residual external policy concerns which should negate or limit the duty.[82] Although what this means has been much discussed and is outside the scope of this commentary, suffice it to say that Canadian courts are required to consider "the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally" before a new duty of care is recognized.[83] Matters such as "indeterminate liability," opening the "floodgates," the effect of liability on insurance premiums, taxes, and police conduct, and other such concerns have been raised in Canadian tort cases to restrict the growth of negligence law.

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77. See *id.* para. 1, where the Chief Justice began her judgment by stating that "[f]reedom of expression is guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*. It is essential to the functioning of our democracy, to seeking the truth in diverse fields of inquiry, and to our capacity for self-expression and individual realization." It must be underscored that this shift away from protecting reputations to broadening freedom of speech and the press has been a long time coming. Canadian defamation law, like Commonwealth defamation law in general, had long explicitly rejected *New York Times v. Sullivan*, 376 U.S. 254 (1964), as something that should be adopted in Canada. Canadian judges have frequently insisted that the balance between reputation and free speech struck by the Canadian law of defamation was correct and consistent with the Charter. Recent judgments in Canada have now questioned that assumption and broadened the defenses available to the media.

78. See, for example, the Canadian vicarious liability judgments where fair compensation and deterrence of wrongdoing were said to be the policies underlying vicarious liability. I have written about the use of policy in tort law cases in Lewis N. Klar, *Judicial Activism in Private Law*, 80 CAN. BAR REV. 215 (2001).

79. [2001] 3 S.C.R. 537 (Can.).

80. [1978] A.C. 728 (H.L.).

81. *See Cooper*, 3 S.C.R., para. 30.

82. *See id.* paras. 30–38.

83. *Id.* para. 37.

F. Product Liability

The one important and probably best-known area of divergence between Canadian and American tort law is in product liability.[84] Due to the wide use of products which have been manufactured in either country by consumers of both countries, the fact that Canadian and American product liability laws differ can have enormous importance.

At least theoretically, Canadian product liability law falls into negligence law, and American law is based on strict liability.[85] Arguments to adopt strict product liability have so far not been accepted in Canada by Canadian judges.[86]

Whether Canadian and American product liability laws are that much different in practical effect is an interesting question.[87] The Canadian manufacturer is required to manufacture, design, and market its product using reasonable care.[88] However, when considering whether a product has been manufactured negligently, inferences of negligence which impose an evidentiary burden of disproof frequently assist the plaintiff's case. When a product malfunctions and causes injury, an inference that it was manufactured due to negligence can often be made.[89] In terms of the duty to design a product with reasonable care, Canadian law uses the American "risk-utility" approach.[90] This takes into account a host of factors which go not to whether "reasonable care" was used in designing the product, but whether the design was reasonable.[91] This is based on factors such as the utility of the product, the likelihood of harm, the availability of a safer design, the costs of a safer design, the ability of the consumer to avoid harm, the ability of the consumer to become aware of the risks, and the

84. *See* Linden, *supra* note 1, at 414–17.

85. *See id.* at 417.

86. *See, e.g.*, Andersen v. St. Jude Medical Inc., [2002] O.T.C. 53 (Can. Ont. Sup. Ct. J.). The case concerned injuries caused by implanted heart valves. *See id.* The court struck out pleadings arguing for strict liability. *Id.* para. 40.

87. *See* Denis W. Boivin, *Negligence, Strict Liability and Manufacturer Failure to Warn: On Fitting Round Pegs in a Square Hole*, 16 DALHOUSIE L.J. 299 (1993). The author argues that despite the rhetoric to the contrary, the differences between Canadian and U.S. approaches to products liability are not as large as one imagines. *Id.* at 304.

88. *See id.* at 349.

89. This is based on the well-known doctrine of "*res ipsa loquitur*." *See id.* at 303 n.14. Although the Supreme Court of Canada in *Fontaine v. B.C. (Official Administrator)*, [1998] 1 S.C.R. 424, para. 27 (Can.) declared that the maxim of *res ipsa loquitur* should be treated as "expired," the use of indirect or circumstantial evidence to prove negligence is very much alive in Canada. The point the Court was making is that one should not see the maxim as a special doctrine, deserving of its own phrase, as this tends to confuse judges and juries. *See* KLAR, *supra* note 71, at 565–84.

90. *See* KLAR, *supra* note 71, at 366–68.

91. *Id.* at 367–68.

manufacturer's ability to spread the costs relating to improving the safety of the design.[92]

V. CONCLUSION

In considering the impact of U.S. tort law on other countries, one must reflect upon Canada's unique position. Although its legal history, political structure, and communitarian values mirror those of other Commonwealth countries, geographical proximity and shared cultural influences have brought Canadian and American tort laws closer together. Canadian tort law uses the civil jury, contingency fees, punitive damages, and class actions, and tends to be quite policy-oriented. Further, American tort law is frequently cited in Canadian tort cases.[93] This blending of the two nations' tort laws is likely to continue as interaction between the two countries increases.

92. *See* McEvoy v. Ford Motor Co., [1989] B.C.J. No. 1639 (Can. B.C. Sup. Ct.); Rentway Can. Ltd. v. Laidlaw Transport Ltd. (1989), 49 C.C.L.T. 150 (Can. Ont. H.C.J.), *aff'd* 1994 CarswellOnt 2790 (Can. Ont. C.A.) (WL).

93. Our recent search indicates that the *Restatement of Torts*, for example, has been cited in nearly 200 Canadian tort law cases. *See* Linden, *supra* note 1 (giving numerous examples of U.S. tort cases and articles being cited in important Canadian tort law cases).